Act of 1898. Most of the courts, however, are realizing that this is a fiction, useful at times for "shorthand" expression, but which must be disregarded in analyzing specific problems, and in rendering decisions.[20]

RESALE PRICE MAINTENANCE.—The tendency among manufacturers of branded goods is to fix the prices at which they will be resold in their distribution from the factory to the consumer. The advertiser who has popularized a trademark regards such regulation as the most feasible, if not the only, way of protecting his heavy investment from the havoc caused by dealers who buy his goods, and sell them at cut prices as "leaders," or who undersell the less efficient stores, and thus discourage the latter from "pushing" the trade-marked brand.[1] Special importance consequently attaches to the recent case of *Federal Trade Commission* v. *Beech-Nut Packing Co.* (1922) 42 Sup. Ct. 150, which brings the vexed problem of the legality of price fixing a step nearer solution. The defendants were producers of various, well-advertised lines of branded goods. They drew up a schedule of resale prices, making it generally known in the trade that no wholesaler, jobber or retailer could purchase their goods unless he adhered to the schedule. To effectuate the threat consignments were key-numbered; loyal traders and special agents were asked to report violations; and the offenders so discovered were black-listed. Finally, the defendants' salesmen who solicited orders directly from retailers relayed them only to obedient distributors. The Federal Trade Commission secured a sweeping injunction prohibiting the Company from (1) "carrying out or causing others to carry out a resale price maintenance policy"; and more particularly from (2) refusing to sell to any distributor for not adhering to the resale price scheme; and finally from (3) securing the coöperation of its distributors in carrying out the scheme. On appeal the Supreme Court sustained the order so far as it prohibited the utilization of the above mentioned methods of ascertaining violations of and enforcing the resale price policy, but it granted the defendants the bare refusal to sell. Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice McKenna, and Mr. Justice McReynolds dissented.

The situation typified in the instant case is the result of two conflicting tendencies. On the one hand is the doctrine that the trader may freely determine the conditions on which he will do business[2]—subject only to the limitations imposed by communal welfare when the subject matter of the business is property "affected with a public use,"[3] or when a great emergency exists.[4] On the other hand is the desire to perpetuate a competitive economic system, as ex-

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[20] See the discussion in *Francis* v. *McNeal, supra,* footnote 6, pp. 699 *et seq.;* and the dissenting opinion in *In re Bertenshaw, supra,* footnote 4.

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[1] Usually the dealers' margin of profit is so large that they are able to cut the established prices and still make a profit. Especially the large chain stores since they buy wholesale quantities and therefore pay manufacturers' prices, are enabled profitably to sell to the consumer at but a slightly higher price than the wholesaler charges the retailer. More often, however, dealers who cut buy at the uniform price, but are willing to suffer a loss on the article sold because of the incidental business gained thereby. For a good treatment of the economico-social aspects of the problem, see W. H. S. Stevens, *Re-Sale Price Maintenance* (1919) 19 COLUMBIA LAW REV. 265.

[2] Besides repeated expressions in many cases to that effect, the doctrine is emphatically enunciated in *United States* v. *Freight Ass'n* (1897) 166 U. S. 290, 320, 17 Sup. Ct. 54. See a typical application in *Whitwell* v. *Continental Tobacco Co.* (C. C. A. 1903) 125 Fed. 454.

[3] *Munn* v. *Illinois* (1876) 94 U. S. 113.

[4] *Marcus Brown Holding Co.* v. *Feldman* (1921) 256 U. S. 170, 41 Sup. Ct. 465.

pressed in the anti-trust laws, and the body of case law antedating it. In short, one may act without restraint unless his methods impede unduly competition on the part of others. The problem is: What course of conduct does unduly restrain?[5]

Various situations present themselves. A manufacturer is privileged to announce his desire,[6] and to urge that dealers purchasing his goods shall resell at a fixed price.[7] But may he by contract bind his vendee to maintain the prices? *Miles Medical Co.* v. *Park & Sons Co.*[8] decided in the negative. The plaintiff, a manufacturer of medicines under a secret process, entered into such a contract. The defendants sought to induce a vendee to break his contract. The plaintiff's prayer for an injunction was refused. The court said that such contracts were in restraint of trade and hence void. Since the plaintiff made his products under a secret process, it is at first blush difficult to see how one who legally has a factual monopoly unduly restrains competitive business by selling his product upon certain conditions only. The plaintiff could have sold his entire output to one man,[9] or distributed his goods to one man in each specified territory.[10] He could have attached conditions to such sale.[11] The plaintiff, however, had made the fixed price contract with different dealers, B, C and D, at the same time. Though any one of these contracts taken by itself is not contrary to public policy, together they are equivalent to contracts among B, C and D to maintain prices. Such agreements are a violation of the anti-trust laws.[12]

Miles Medical Co. v. *Park & Sons Co.* decided only that one making a contract fixing a resale price could not enjoin a third party from inducing a breach, but it also necessarily implied that as between the contracting parties such an agreement was void. The point came up for direct decision in a series of notable patent cases.[13] It was contended that the patentee has absolute control over, as

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[5] In the discussion which follows no distinction is made between patented, trade-marked, secret-processed and common commodities. A patentee may, of course, dispose of his patent as he sees fit. *Bement* v. *National Harrow Co.* (1902) 186 U. S. 70, 22 Sup. Ct. 747. But that simply means that his power over the right to reduplicate his creation is unlimited. After the article produced under the patent has gone into commercial channels, the inventor's control over it is like that of the producer of any commodity. *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A. 1921) 271 Fed. 810; see cases *infra,* footnote 16. The situation of the owner of a secret process is similar. He is protected from any revelation of his process, resulting from breach of confidence. *Tabor* v. *Hoffman* (1889) 118 N. Y. 30, 23 N. E. 12. But after the article has gone into commerce it loses its distinctive character. *Miles Medical Co.* v. *Park & Sons Co., infra,* footnote 8. A different attitude toward patented and secret-processed articles is conceivable. The courts might have given their owners greater rights. As the cases stand, however, a patentee is protected from infringement only. Inasmuch as the community gets the benefit of the invention, the inventor is given exclusive control over his creation, though another may have independently invented a similar article. The owner of a secret process, being unwilling at any time to share his finding with the community, is not protected from the danger of having his creation independently discovered.

[6] See *United States* v. *Colgate & Co.* (1919) 250 U. S. 300, 307, 39 Sup. Ct. 465.

[7] *Frey & Son* v. *Cudahy Packing Co.* (1921) 41 Sup. Ct. 451.

[8] (1911) 220 U. S. 373, 31 Sup. Ct. 376.

[9] See *Virtue* v. *Creamery Package Co.* (1913) 227 U. S. 8, 32, 37, 33 Sup. Ct. 202.

[10] *Whitwell* v. *Continental Tobacco Co., supra,* footnote 2.

[11] See *Locker* v. *American Tobacco Co.* (C. C. A. 1914) 218 Fed. 447, 449.

[12] *Standard Sanitary Co.* v. *United States* (1912) 226 U. S. 20, 33 Sup. Ct. 9.

[13] *Straus* v. *Victor Talking Mach. Co.* (1917) 243 U. S. 490, 37 Sup. Ct. 412; *Bauer* v. *O'Donnell* (1913) 229 U. S. 1, 33 Sup. Ct. 616; *Boston Store* v. *American Graphophone Co.* (1918) 246 U. S. 8, 38 Sup. Ct. 257.

well as a legal monopoly of, his invention, and that hence the anti-monopoly legislation did not apply to him. The Victor Co. having sold their products to R. H. Macy & Co. under a "notice" contract[14] fixing the resale price, sought to enjoin their violation of the agreement.[15] The injunction was refused. The court realized the double aspect of monopoly as set forth by Mr. Justice Hughes in the *Miles* case. The court held that while it was true that the Victor people, similarly to the Miles Medical Co., had a monopoly of their own goods, and did not compete with themselves, yet their dealers might and did compete with one another, and the selling agreement effectively prevented that. There was also the additional fact that the agreement operated to restrain free alienation. After the vendor had passed his complete title to the goods, it was held he could not maintain sufficient control to regulate the prices.[16]

These cases established that a dealer was not bound by contractual agreements as to the resale price. There remained still to be considered the questions as to whether (1) a non-contractual agreement of the manufacturer and his dealers as to the resale price was actionable criminally, and whether (2) a dealer to whom a manufacturer refused to sell goods could compel the sale, because the manufacturer's refusal was based on the dealer's not adhering to the resale price. The two questions really express one proposition, for if such an agreement is criminal, the aggrieved party is a dealer outside the combination, and he should have the right to force sales to him.

The questions were answered in the negative in the *Cudahy* case.[17] The majority opinion held that there was no combination. It reversed the charge of the lower court that the jury could infer an agreement from the fact that the manufacturer strongly urged resales at fixed prices and that resales actually were made at such prices. But, as the dissenting opinion pointed out, the reasons given for the decision were manifestly unsound. The Supreme Court has repeatedly found combinations where the only facts in evidence were the giving of information and subsequent concerted action.[18] Here, in addition, the concerted action had been strongly urged. The majority opinion did not indicate what additional facts, here lacking, were necessary to constitute a combination. The decision, nevertheless, is in accord with the trend of federal authority. Cudahy had not used "unfair" means of maintaining his resale price policy, and hence his conduct was not criminal.[19] The circumstances marking the "unfair" means were held to be present in the instant case.[20] Granting the assumption of the Supreme Court that price main-

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[14] A notice was attached to each machine purporting to bind the vendee to the performance of the conditions stamped thereon. See *Straus* v. *Victor Talking Machine Co., supra,* footnote 13, pp. 494, 495.

[15] See *Straus* v. *Victor Talking Mach. Co., supra,* footnote 13.

[16] The same considerations which apply to patents extend to copyrights. *Bobbs-Merrill Co.* v. *Straus* (1908) 210 U. S. 339, 28 Sup. Ct. 722; *Straus* v. *American Pub. Ass'n* (1913) 231 U. S. 222, 34 Sup. Ct. 84; see *supra,* footnote 5. Patentees may contract away their producing rights on specified terms. *Bement* v. *National Harrow Co., supra,* footnote 5, but different patentees of competing articles may not combine to sell their wares. *Standard Sanitary Co.* v. *United States, supra,* footnote 12. So an author probably may fix the price at which his publisher shall sell his book, but publishers may not combine to refuse to sell to a dealer who cuts prices. *Straus* v. *American Pub. Ass'n, supra.*

[17] See *supra,* footnote 7.

[18] For instance, a case decided in the same term as the principal case, *American Column & Lumber Co.* v. *United States* (1922) 42 Sup. Ct. 114; see 22 (1922) COLUMBIA LAW REV. 376.

[19] That is the only difference between the *Cudahy* and the principal case.

[20] Mr. Justice McReynolds dissent in the principal case was based on a stipulation of the litigants that the course of dealing between the defendants and their distributors did not constitute a "contract" beween them. Hence the anti-trust laws did not apply. Such a view is untenable as the laws apply to "con-

tenance, if carried too far, is socially harmful, one can understand the court's attempt gradually to differentiate the means used in carrying out such a policy into those that are lawful and those that are unlawful. The line of demarcation seems to be determined by whether a particular device employed is too effective or too likely to be subject to abuse. Adopting this test, the spying system of the Beech-Nut Co. seems to fall well within the prohibited zone.

The status of price fixing today seems to be that a manufacturer may announce the terms which he desires his dealers to make to their vendees, and refuse to supply them unless they agree to sell at that price. But after obtaining the goods, the dealer is free to disregard his promise. The only recourse of the manufacturer is to refuse to supply any further goods. According to the instant case, however, systematic endeavors to ascertain violations of the agreement may be enjoined.

THE LEGAL STATUS OF AN INVOLUNTARY DEPOSITARY.*—It is well settled in the field of voluntary deposits that a misdelivery by a depositary is a conversion,[1] unless he is unaware that he is exercising dominion over the goods.[2]

It is apparent that a variety of circumstances may give rise to an involuntary deposit.[3] It may be caused by an innocent,[4] mistaken, necessary, or wilful trespass of the owner. Innocent trespasses are usually occasioned by the straying of animals onto the land of another. In such a case the depositary may drive them off in a proper manner, thereby incurring no liability[5] even though damage results.[6] If, however, the depositary drives off the animals in an improper manner, and the owner is damaged thereby, the former is liable.[7] At common law animals thus causing a trespass might be impounded by the depositary for *damage feasant* until the owner has made reparation.[8] The law of *damage feasant*[9] and of estrays[10] is largely statutory to-day. The voluntary deposit rule of absolute liability for misdelivery seems clearly unjust in cases of this kind for

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spiracies and combinations" as well as to contracts. (1890) 26 Stat. 209, U. S. Comp. Stat. (1916) § 8820.

* No attempt is made to cover all the causes which may give rise to an involuntary deposit.

[1] Hale, *Bailments* (1896) 243; Story, *Bailments* (9th ed. 1878) § 414.

[2] *Cohen* v. *Koster* (1909) 133 App. Div. 570, 118 N. Y. Supp. 142, two judges dissenting.

[3] The term is used to include all cases wherein a party is given control over a chattel without an exercise of his own volition.

[4] The term is used to include only trespasses which are caused neither by the act of the owner nor by his negligence.

[5] *Cory* v. *Little* (1833) 6 N. H. 213; *Mitten* v. *Faudrye* (1627) Poph. 161.

[6] *Carney* v. *Brome* (N. Y. 1894) 77 Hun 583. It is interesting to compare this case with *Leach* v. *Lynch* (1910) 144 Mo. App. 391, 128 S. W. 795. In the former jurisdiction no fencing statute existed but in the latter the landlord was required to fence. His failure to do so prevented his suing in trespass for the entry by the animal. In each case the animal was removed by the depositary, but in the latter the burden of establishing a proper removal was on the depositary. It seems, therefore, that a fencing statute of this kind has an effect not often recognized, *viz.*, it shifts the burden of establishing that the removal was proper.

[7] *Gilson* v. *Fisk* (1836) 8 N. H. 404 (driving too far).

[8] 3 Bl. Comm. *211.

[9] It is customarily required under these statutes that the animal be taken up in the vicinity of the residence of the taker up. Failure to comply strictly with the terms of the statute renders the depositary subject to a possessory action. It has accordingly been held that a taking up on the land leased by the taker up, but two miles from his residence, did not bring him within the provisions of the statute. *Mills* v. *Fortune* (1905) 14 N. Dak. 460, 105 N. W. 235.

[10] *E. g., ibid.*